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No. 04-

IN THE

Supreme Court of the United States

ZURICH INSURANCE CO. subrogated to the rights of JAMES K. LUDWIG, JR. and CAROL C. LUDWIG,

Petitioner,

v.

CHATHAM COUNTY, GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In this action, the Appellate Court affirmed the decision of the United States District Court Southern District of Georgia Savannah Division holding that the County was entitled to sovereign immunity in a case involving a case involving a hazard to navigation from a drawbridge collapsing onto a boat sailing beneath the defective bridge while it was raised causing extensive damage, thereby creating a conflict of authorities between the Georgia Court of Appeals for the Eleventh Circuit and the Supreme Court of Georgia, the Constitution and statutes of the State of Georgia, and rulings of the U.S. Supreme Court. The questions presented are:

1. Did the U.S. District Court and Court of Appeals err in ruling that sovereign immunity applied to a county which negligently operated and maintained a drawbridge over navigable waters, which collapsed while raised for passage of a yacht, which bridge had collapsed previously causing damage to the yacht involved in this lawsuit and other yachts previously, contrary to the U.S. Supreme Court and of the Supreme Court of Georgia rulings which denied sovereign immunity as that would conflict with maritime law thereby creating a conflict under rulings of the U.S. Supreme Court and the Supreme Court of Georgia.

2. Did the United States District Court and the Court of Appeals err in ruling that the county was entitled to sovereign immunity for damage to a yacht traveling under a drawbridge constructed, operated, and maintained by the County which damage was caused by the collapse of the bridge while raised for passage of the yacht as Georgia law provides that if a county has a duty to repair and maintain the roads and bridges

within the county, have the necessary authority to carry out that duty, then the county must also bear the liability for any defective bridge for damages occurring resulting from such repairs provided the county has not obtained a performance bond (which was not obtained for this bridge at the time of this damage). O.C.G.A. § 32-4-71, thereby creating a conflict between the rulings of the Eleventh Circuit, the U.S. Court of Appeals, and Georgia statutory law.

3. Did the U.S. District Court and U.S. Court of Appeals err in determining that a Defendant/Appellee, Chatham County, as a political subdivision of the state was an "arm of the state" when the County alone would be responsible for satisfying the adverse judgment, and the State of Georgia has no control over the maintenance and operation of the bridge all of which would be required if the state is to be granted sovereign immunity in this claim thereby being in conflict with the same Court's ruling in *Vierling v. Celebrity Cruises*, 339 F.3d 1309 (11th Cir. 2003).

4. Did the court err in ruling that Chatham County is entitled to sovereign immunity even though the damages inflicted on the Plaintiffs were caused by the negligent performance of ministerial act and the creation of a continuing nuisance which the Constitution of the State of Georgia provides that sovereign immunity is not granted in such instances, thereby creating a conflict between the ruling of the U.S. Court of Appeals for the Eleventh Circuit and the Constitution of the State of Georgia.

5. Did the U.S. District Court and the U.S. Court of Appeals err in dismissing the plaintiffs' claim on the grounds of residual common law and sovereign immunity thereby ignoring the numerous cases decided by the U.S. Supreme

Court which held state and local government authorities responsible for creating hazards to navigation.

6. Did the U.S. District Court and the U.S. Court of Appeals err in holding that "residual sovereign immunity" (quotation marks inserted by Court) that arises from common law applies which was referred to in page 6 of the District Court Order does not have that quoted language nor does any opinion of any appellate court in the State of Georgia contain such quoted language of "residual sovereign immunity" (quotation marks inserted by Court) as to justify granting sovereign immunity on that questionable ground as opposed to 11th amendment sovereign immunity?

7. Did the U.S. District Court and the U.S. Court of Appeals for the Eleventh Circuit err in relying on *Federal Maritime Commission v. State of South Carolina State Ports Authority*, 535 U.S. 743, 753, 122 S. Ct. 1864, 152 L. Ed. 2d 962 as authority for granting the defendant "residual sovereign immunity" (quotation marks inserted by Court) which does not mention "residual sovereign immunity" (quotation marks inserted by Court) thereby creating and magnifying the conflict between Georgia case law, Georgia statutory law, Georgia constitutional law, and the U.S. Supreme Court decisions which should have precluded sovereign immunity as a defense for the county?

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OPINIONS BELOW

The opinion of the United States District Court Southern District of Georgia Savannah Division is styled as *Zurich Insurance Company subrogated to the rights of James K. Ludwig and Carol C. Ludwig v. Chatham County, Georgia,* which is unreported. (App. B).

The opinion of the Court of Appeals for the Eleventh Circuit is unreported. (App. A).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on January 28, 2005. (App. C). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Georgia's Constitutional Art. I, Sec. II, Par. IX (d) states,

> . . . all officers and employees of the state or its departments and agencies may be subject to suit and may be liable for injuries and damages caused by the negligent performance or the negligent failure to perform the ministerial functions and may be liable for injuries and damages if they act with actual malice, or with actual intent to cause injury in the performance of their official functions. . . .

Art. I, Sec. II, Par. IX (e) 1991 Amendment to Georgia Constitution provides sovereign immunity extended to the "state and all of its departments and agencies" except to the extent provided for by the Georgia Legislature.

O.C.G.A. § 32-4-71(b): If the condition of bridge repair authorized by Code Section 32-4-70 to be added to the performance bond is not taken, the contracting county or counties shall be primarily liable for all injuries caused by reason of any defective bridge for damages occurring within seven years of the contractor's work on the bridge and its acceptance by the county or counties, provided that the county shall be discharged from all liability upon the inclusion in the performance bond of the aforesaid bridge repair condition.

OCGA § 32-4-02

O.C.G.A. § 32-4-41

OCGA §§ 32-4-70 – 32-4-71

O.C.G.A. § 50-21-22(5).

O.C.G.A. § 48-5-220(4)

O.C.G.A. § 32-4-70(b)

STATEMENT OF THE CASE

This action seeks recovery of damages to the Catalina yacht, identified as "LOVE OF MY LIFE," which it sustained while passing under the Causton Bluff Bridge in Savannah, Georgia on October 6, 2002.

Causton Bluff Bridge is a drawbridge which is owned, operated and maintained by Chatham County and spans the Wilmington River, a navigable body of water which is part of the Intercoastal Waterway.

On October 6, 2002, James K. Ludwig was sailing his vessel "LOVE OF MY LIFE" on the Intercoastal Waterway. He contacted the bridge operator and requested that the bridge be raised to allow his vessel to sail beneath the bridge. The bridge tender opened the bridge by raising the spans and the Northwest span did not remain in its raised position, but drifted down, causing the vessel to strike the span. The Plaintiffs' Expenses amounted to $137,987.67.

The falling span caused damage to other vessels beginning in 1990 when it fell, striking a vessel. This occurred several times thereafter.

The County performed repairs and maintenance on the bridge, especially the locking mechanisms on several occasions.

After suit was filed and discovery commenced, the trial court granted the Defendant's Motion for Summary Judgment based on common law sovereign immunity. In granting the Motion, the Court ignored and did not discuss the issue of whether the maintenance and repair of a bridge by a county constituted ministerial acts for which the Constitution of the State of Georgia (Article 1, § 2, Par, 9) specifically exempts ministerial acts from sovereign immunity and authorizes suit against the governmental bodies for negligent performance of ministerial acts. Moreover, the courts must have been aware of the issue because the District Court used the case of *Kordares v. Gwinnett County,* 220 Ga. App. 848, 849-50, 470 S.E.2d 479 (1996) for the authority that "merely building and operating roads and bridges does not waive its sovereign immunity". *Kordares, supra* However, that cited case to which the Court gave deference does not apply to the conduct of the county in the instant case. In *Kordares*, the county and

its employees were entitled to sovereign immunity because the plaintiff's contention was that the county failed to perform a subsurface inspection of the bridge. The act of performing an inspection is a discretionary act as stated by the *Kordares* court and therefore Georgia law was followed in the *Kordares* case. It was not followed in the instant case because the county employees performed maintenance and repairs of the bridge which are ministerial acts for which sovereign immunity does not apply. *Brannen v. City of Brunswick,* 49 Ga. App. 62, 174 S.E. 186; *Joyce v. VanArsdale,* 196 Ga. App. 95, 395 S.E.2d 275; *Miree v. United States,* 490 F. Supp. 768 (M.D. Ga. 1980). *Kordares* also refutes another erroneous statement of law in the District Court that the fact that the "County has immunity-waiving insurance, and Plaintiff has not otherwise shown that the County's sovereign immunity was waived . . ." (USDC opinion p.10-11) is in conflict with the *Kordares* case which holds that doctrine of sovereign immunity applies regardless of purchase of liability insurance. *Kordares v. Gwinnett County,* 220 Ga. App. 848, 849-50, 470 S.E.2d 479 (1996) Likewise, it created a conflict when it ignored the U.S. Supreme Court case of *Workman v. Mayor of New York City,* 179 U.S. 552, 21 S. Ct. 212, 21 L. Ed. 314 declaring that admiralty law supercedes state law governing sovereign immunity. In addition, the Supreme Court of Georgia ruled in the case of *Hines v. Georgia Ports Authority,* 278 Ga. 631, 604 S.E.2d 184, which ruling was made after the ruling of the trial court but prior to the ruling affirming the trial court's decision by the U.S. Court of Appeals for the Eleventh Circuit, which court was apprised of the *Hines* ruling and which followed the *Workman, supra,* decision citing it, and holding that admiralty law supercedes state law involving sovereign immunity, thereby creating a conflict between the U.S. Court of appeals for the Eleventh Circuit and the Supreme Court of Georgia.

REASONS FOR GRANTING THE PETITION

The opinion of the U.S. Court Appeals for the Eleventh Circuit in this case has created a fictitious standard of sovereign immunity by referring to "residual sovereign immunity" as referred to in the case of *Federal Maritime Commission v. State of South Carolina State Ports Authority,* 535 U.S. 743, 753, 122 S. Ct. 1864, 152 L. Ed. 2d 962. The Federal Maritime Commission ruling by the U.S. Supreme Court does not refer to residual sovereign immunity. Yet, the U.S. Court of Appeals for the Eleventh Circuit cited that case and, in doing so, referred to the authority of Gilbert v. Richardson which opinion did not provide any exceptions for residual sovereign immunity. Therefore, a conflict was created between all opinions involving sovereign immunity of any court and jurisdiction and the ruling of the U.S. District Court and the U.S. Court of Appeals for the Eleventh Circuit applying residual sovereign immunity as authority for granting sovereign immunity to the County in this case in spite of the fact that Georgia Statute and Constitutional law expressly waives sovereign immunity in a case with these facts.

The opinion of the U.S. Court of Appeals for the Eleventh Circuit in this case is in conflict with a ruling of The United States Supreme Court in the case of *Workman v. Mayor of New York City* (179 U.S. 552) in which the U.S. Supreme Court ruled that state conferred immunity is preempted by admiralty law, whereas the appellate court opinion in this case which affirmed the opinion of the trial court held that sovereign immunity applies in spite of the bridge in question having created a hazard to navigation, and in spite of Georgia constitutional and statutory law that held the acts of the county in repairing and maintaining a bridge are ministerial

in nature and sovereign immunity does not apply. (Citing *Brannen v. City of Brunswick,* 49 Ga. App. 62, 174 S.E. 186; *Joyce v. VanArsdale*, 196 Ga. App. 95, 395 S.E.2d 275; *Miree v. United States,* 490 F. Supp. 768 (M.D. Ga. 1980). Thereby creating a conflict between the Circuit Court opinions and Georgia Appellate Court opinions.

The District Court's June 28, 2004 Order, as affirmed by the Eleventh Circuit Court of Appeals by an Order dated January 28, 2005, is in conflict with the decision of the Supreme Court of Georgia in *Hines v. Ga. Ports Auth.,* 278 Ga. 631, 604 S.E. 184 (2004), overruling the decision in the trial court and intermediate appellate court's granting sovereign immunity to the Georgia Ports Authority in a case involving injury to a longshoreman working on a container ship who was struck by a crane negligently operated by an employee of the Georgia Ports Authority even though the Georgia Ports Authority enjoyed immunity under the Georgia State Constitution in favor of the ruling of the U.S. Supreme Court in *Workman v. Mayor of New York City* (179 U.S. 552), which was cited and which held that state conferred immunity is preempted by admiralty law.

Though the *Hines* decision involves the application of Eleventh Amendment sovereign immunity and not the "residual sovereign immunity" relied upon by the District Court, the decision still has a direct impact on the basis for the District Court's June 28, 2004 order which relied on Georgia's extension of sovereign immunity. It stated "Plaintiff does not dispute that counties exercise state power to acquire land and build and operate bridges. *See* OCGA § 32-4-02 (preamble (enumerating state's delegation of its powers to a county with respect to county road systems); *id.* at (3)(A) (counties may exercise the state's power to

condemn land for roads); *id.* at (8) & (11) (county can exercise the state's power to tax for road-building/maintenance purposes); OCGA §§ 32-4-70 – 32-4-71 (governing county authority to construct, reconstruct and repair bridges, payment bonds for same). (Opinion p.10)

Continuing, the trial court stated,

> By acquiring the land, constructing, and operating the bridge in question, the County was exercising these state powers. Merely building and operating roads and bridges does not waive its sovereign immunity. *Kordares v. Gwinnett County,* 220 Ga. App. 848, 849-50, 470 S.E.2d 479 (1996); *see also Kitchen v. CSX Transp., Inc.*, 6 F.3d 727, 731 (11th Cir. 1993) (noting that in absence of waiver, Georgia' sovereign immunity extends to counties as subdivisions of the state) In fact, it is Plaintiff's burden to show a waiver. *Smith v. Chatham County,* 264 Ga. App. 566, 567-68, 591 S.E.2d 388 (2003).

(Opinion p.10). These courts refused to accept that this burden was carried by the plaintiffs when they cited *Workman v. Mayor of New York City,* 179 U.S. 552, 21 S. Ct. 212, 45 L. Ed. 314, which held that admiralty law would supercede state law granting sovereign immunity to the state and counties; *Christy v. Pennsylvania Turnpike Commission,* 54 F.3d 1140, ruling that the party asserting the defense of sovereign immunity bears the burden of proving its entitlement thereto; and O.C.G.A.§ 32-4-71(b) the Georgia law which expressly holds the county liable for injuries caused by reason of any defective bridge foreclosure. The Georgia Constitution, Art. I, Sec. II, paragraph 9(d) states that sovereign immunity does not apply to the negligent

performance of ministerial acts, which occurred in this case involving maintenance and repair of the drawbridge over navigable waters.

Thus, the District Court's order of June 28, 2004 is entirely premised and focused on the application of state legislated sovereign immunity with regard to the question of whether Chatham County is entitled to assert sovereign immunity as a defense in this case. However, the trial court's reference to the decision in *Kordares v. Gwinnett County*, 220 Ga. App. 848, 849-850 (1996) stating "merely building and operating roads does not waive its sovereign immunity" is incomplete in omitting the discretionary acts performed which eliminates that case as authority for the ministerial acts negligently performed in this case. The Court in *Kordares* determined that sovereign immunity bars any action for personal injury or wrongful death against a county arising from nuisance or inverse condemnation. The *Kordares* decision focused exclusively on the doctrines of sovereign immunity for negligently performed discretionary acts and official immunity as promulgated in Art. I, Sec. II, Par. IX of the Georgia Constitution of 1983, as amended in 1991 which dealt with exemptions for negligent performance of ministerial acts for which there is no sovereign immunity exemption. The *Kordares* decision did not focus on the State of Georgia's sovereign immunity under the United States Constitution nor the statute declaring counties are liable in Georgia for damages cause by defective bridges, O.C.G.A 32-4-71(b) and should not have been employed as authority for the ruling in this case.

The trial and appellate courts relied on an interpretation of Georgia law that had been revoked and changed by the adoption of a constitution amendment in 1991 that applied

to the damage that occurred to the plaintiffs' property in 2002. It is evident from reading the trial court's order that it also relied upon the decision in *Smith v. Chatham County*, 264 Ga. App. 566 (Ga. App. 2003). The *Smith* decision, makes reference to "no immunity waiving insurance" and "it is Plaintiff's burden to show a waiver" which again, solely focuses on a county's sovereign immunity under the Georgia State Constitution. The *Smith* decision is distinguishable because it does not focus on the State of Georgia's sovereign immunity under the United States Constitution and which is refuted by the *Kordares* case (supra) as it relates to the purchase of liability insurance. Finally, the Eleventh Circuit's decision in *Kitchen v. CSX Transportation,* (6 F.3d 727, 731 (11th Cir. 1993)), which is also cited in the trial court's decision, turns on the facts that

> Under the Georgia Constitution a county waives its sovereign immunity to the extent of liability insurance coverage." However, this reference to the *Kitchen* case in the insurance coverage context is an extreme departure from the principal ruling of the same Eleventh Circuit Court of Appeals that the allegedly negligent acts of the county official in connection with erecting and maintaining barricades and signs were of ministerial character . . .

Kitchen v. CSX Transportation, (6 F.3d 727, 731 (11th Cir. 1993)). Most important is that the plaintiff's injury in the *Kitchen* case occurred in 1988, prior to the 1991 amendment to the Georgia Constitution which revoked, recanted, repealed and decidedly abolished that provision of the Georgia Constitution which so misled the trial and appellate court in their rulings in this case. (*See Kodares, supra* at 220 Ga. App. 849)

A review of the final paragraph preceding the conclusion of the District Court's order clearly reveals that this Court based its determination of Chatham County's sovereign immunity on Chatham County's state legislated sovereign immunity under the Georgia Constitution. It also reveals that the District Court did not base its determination on the State of Georgia's sovereign immunity under the United States Constitution as it states:

> In this case, the County has no immunity-waiving insurance, and plaintiffs have not otherwise shown that the State or County waived the County's sovereign immunity. Nor is the County otherwise before the Court but attempting to invoke an admiralty-preempted state statute aimed at defeating or impinging admiralty law. (Opinion p.10)

However, the presence or absence of insurance is not to be considered in determining whether the government entity is entitled to sovereign immunity as this law was changed in 1991. (*See Kodares, supra*) Prior to the 1991 amendment, Art. I, Sec. II, Par. IX of the 1983 Constitution provided for a waiver of sovereign immunity for any claim against "the state or any of its departments and agencies" to the extent of any liability insurance. Under the 1983 Constitution the courts interpreted the phrase "the state or any of its departments and agencies" to *include* counties, county school boards, municipalities, Board of Regents, and hospital authorities. *See Hiers v. City of Barwick*, 262 Ga. 129, 414 S.E.2d 647 (1992) (municipalities); *Wilson v. Bd. Of Regents, et., of Ga.*, 262 Ga. 413, 419 S.E.2d 916 (1992) (Board of Regents); *Culberson v. Fulton-Dekalb Hosp. Auth.*, 201 Ga. App. 347, 411 S.E.2d 75 (1991) (hospital authorities);

Thigpen v. McDuffie County Bd. Of Ed., 255 Ga. 59, 335 S.E.2d 112 (1985) (counties and county school boards). The 1991 amendment to Art. I, Sec. II, Par. IX of the 1983 Georgia Constitution (1991 amendment) provided sovereign immunity extended to the "state and all of its departments and agencies," except to the extent provided for by the Georgia legislature. Under the Georgia Tort Claims Act (GTCA), although the "state" previously waived its sovereign immunity to the extent of insurance, the statute specifically *excludes* "counties, municipalities, school districts, other units of local government, [or] hospital authorities" from the definition of "state." O.C.G.A. § 50-21-22(5).

Given the District Court's terminology in deciding this case, it is obvious that the Court's decision was erroneously based upon the belief that Chatham County did not waive its' **state legislated sovereign immunity** by not having immunity waiving insurance since sovereign immunity under the United States Constitution can not be waived by insurance. Moreover, the last sentence of this Court's order clearly references the Plaintiff's arguments that Chatham County's **state legislated sovereign immunity** was waived by virtue of a state statute. (emphasis ours) (Order, June 28, 2004, p. 10.)

Petitioners respectfully submit that there is no indication from the District Court's order, as affirmed, that the Court's determination of the case was based on a review of the uniformly accepted and followed elements for determining the entitlement of a county to assert a state's sovereign immunity under the United States Constitution nor the fact that Georgia appellate courts have ruled that bridge maintenance constitutes a ministerial act, nor the Georgia statute that the county shall be primarily liable for all injuries

caused by reason of any defective bridge for damages, O.C.G.A. § 32-4-71(b) nor that the repeated failure of the bridge to remain upright and fall onto a passing vessel constitutes a continuing nuisance. (*See Brannen v. City of Brunswick, supra,* and *City of Bowman v. Gunnells,* 243 Ga. 809, 256 S.E.2d 782)

As Plaintiffs argued to the District Court and to the Eleventh Circuit Court of Appeal, in the interest of uniform application of maritime law, federal courts exercising admiralty jurisdiction are not bound by local laws limiting the liability of governmental agencies; admiralty courts traditionally rely upon federal maritime law, rather than state statutory law, in assessing claims of sovereign immunity, citing *See Workman v. New York City,* 179 U.S. 552, 573-574 (1900). The United States Supreme Court in *Workman* determined that local law does not control maritime law and, therefore, cannot prevent liability of a municipal corporation for a maritime tort. (*Workman, supra*)

Likewise, where immunity was held to be in effect in the case of ex parte New York (256 U.S. 490, 65 L. Ed. 1057, 41 S.E. 588, the Court in that case concluded that State immunity from suit applied in admiralty and maritime jurisdiction matters unless the State had given its consent. Applying that law to the State of Georgia and its application to Chatham County, the District Court had already been apprised of the provisions in the Constitution of Georgia which provided express permission to sue for damages for ministerial acts thereby precluding the defense of sovereign immunity. Ga. Constitution, Article 1, Section 2, Par. 9 (d) and the Georgia law declaring the county primarily liable for damages caused by defective bridges. O.C.G.A. § 32-4-71(b).

The Georgia Supreme Court in *Hines v. Georgia Ports Authority, supra* reached this same conclusion. The Court in *Hines* determined that the Georgia Ports Authority enjoyed immunity under the Georgia State constitution but stated "however, the United States Supreme Court held in *Workman v. Mayor of New York City, supra* that **state-conferred immunity is preempted by admiralty law.** Thus, the Ports Authority **does not enjoy state-conferred immunity** *for the* Hines's **claims that sound in admiralty law**." 278 Ga. 631, 604 S.E.2d at 191-192. (*Emphasis added*).

A review of the order in this case demonstrates that the District Court's determination of this case, as affirmed by the Appellant Court, was based upon grounds which are clearly erroneous following the issuance of the Georgia Supreme Court's holding that "state-conferred immunity is preempted by admiralty law" in *Hines v. Georgia Ports Authority*, (278 Ga. 631, 604 S.E.2d at 191-192) which thereby created the conflict between the opinion of the highest state court in Georgia and the U.S. Court of Appeals which decides cases arising out of Georgia.

The correct test for determining whether a political subdivision of Georgia is an "arm of the state" was not applied by the lower courts in deciding this case.

The Georgia Supreme Court's decision in the *Hines* case *supra* serves to correct the District Court's rejection of the *Vierling v. Celebrity Cruises* analysis by making it the applicable standard for use when evaluating the application of sovereign immunity of Georgia State agencies. *Vierling v. Celebrity Cruises,* 339 F.3d 1309, 1313-1315 (11th Cir. 2003) In *Vierling,* the Eleventh Circuit held that the Port Authority was not entitled to sovereign immunity as it was financially

self-sufficient, generated its own revenues, and paid its own debts. Furthermore, (the Eleventh Circuit reasoned), "**the state has no control over the operation of the facility and Florida law treats the Port Authority, as an entity of the county, not of the state**." *See Vierling v. Celebrity Cruises*, 339 F.3d at 1315 (*Emphasis added*).

Because of the Georgia Supreme Court's adoption of *Vierling* in *Hines v. Georgia Ports Authority, supra,* at page 93 certiorari should be granted and the District Court's June 28, 2004, order as affirmed in the appellate court must be reversed because the Georgia Supreme Court has already tacitly recognized that Chatham County cannot serve as an arm of the state under the *Vierling* test. In order to remove any confusion as to why Chatham County is not an "arm of the state" under the *Vierling* test the Plaintiffs provide the following review of the applicable facts and law.

In *Vierling*, the Eleventh Circuit stressed the importance of determining whether the state or the county would ultimately be responsible for satisfying any adverse judgment. 339 F.3d at 1314. Specifically the Eleventh Circuit noted:

> Although no single factor is dispositive, the third factor, the source of the entity's funds and responsibility for satisfying judgments, is "of considerable importance." *Doe,* 519 U.S. at 430, 117 S. Ct. at 904. "Thus, when an action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit." *Id.* at 429, 117 S. Ct. at 903-04 (*internal quotation marks omitted*).

339 F.3d at 1314. (*citing Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429, 117 S. Ct. 900, 137 L. Ed. 2d 55 (1997)).

Respondent Chatham County has admitted that the State of Georgia will not have any financial liability, whatsoever, for any judgment entered against Chatham County. (*See* Exhibit A to this Motion for Relief from Judgment containing responses to Plaintiff's Second Set of Requests for Admission), *Continental Ins. Co., subrogated to rights of Dennis K. Rings v. Chatham County, USDC, Southern District of Georgia, Savannah Division, Civil Action No. 403-038, In re Herb Goetz & Marlen Horn Associates, Inc.,* 120 F.3d 268 (9th Cir. 1997). Specifically, Defendant Chatham County admitted (*See* Exhibit A, No. 13) *Continental Ins. Co., subrogated to rights of Dennis K. Rings v. Chatham County, USDC, Southern District of Georgia, Savannah Division, Civil Action No. 403-038, In re Herb Goetz & Marlen Horn Associates, Inc.,* 120 F.3d 268 (9th Cir. 1997), that any judgment entered against Chatham County, in the instant case, would not be satisfied by funds received from:

a) the State of Georgia as part of general revenue funds provided to Chatham County;

b) the State of Georgia as part of funds which are directly earmarked for the payment of a judgment against Chatham County in this litigation;

c) the State of Georgia as part of funds that are earmarked for the payment of judgments in general.

Furthermore, Respondent Chatham County has admitted that the money Chatham County spent on maintenance of, and repairs to, the Causton Bluff Bridge from 1995 to the present was not allocated from funds Chatham County received from the State of Georgia. *Continental Ins. Co., subrogated to rights of Dennis K. Rings v. Chatham County, USDC, Southern District of Georgia, Savannah Division, Civil Action No. 403-038, Chandler v. United States*, 328 F.2d 906. Defendant Chatham County has also admitted that no funds were received by Chatham County from the State of Georgia that were designated by the State of Georgia for the operation, maintenance or repair of the Causton Bluff Bridge. *Continental Ins. Co., subrogated to rights of Dennis K. Rings v. Chatham County, USDC, Southern District of Georgia, Savannah Division, Civil Action No. 403-038, Chandler v. United States*, 328 F.2d 906.

The other two factors of the *Hines/Vierling* test "are mixed but tend to weigh towards a finding of no immunity" just as they did in *Hines* when no sovereign immunity was found even though the Ports Authority was "performing an essential governmental function."

When the status of Chatham County in the construction, maintenance and operation of the Causton Bluff Bridge is compared to the Eleventh Circuit's analysis of the status of Broward County, Florida with regard to its operation of Port Everglades in *Vierling*, or the Georgia Supreme Court's analysis in *Hines* of the Georgia Ports Authority, many of the same considerations are found to exist that caused the two port agencies to be denied the status of "arms of the state." Specifically, the Port Everglades Authority, a department of Broward County was found to have the following characteristics:

Florida law gives counties an independent status in operating port facilities. For example, (1) Florida law provides counties with the authority to own, operate, and manage port facilities, and the authorization to charge fees for use of a port facility, Fla. Stat. ch. 125.012; (2) Florida law authorizes counties to issue bonds for the purpose of paying for all or part of the cost of operating the port facilities, Fla. Stat. Ch. 125.013, 125.015; and (3) Florida law permits county commissioners to sue or be sued in their operation of a port facility, Fla. Stat. Ch. 125.15. Each of these statutory provisions indicates that the Port Authority is independent of the State of Florida. *See Moor v. Alameda County*, 411 U.S. 693, 719-20, 93 S. Ct. 1785, 1800-01, 36 L. Ed. 2d 596 (1973).

339 F.3d at 1314 n.15.

The *Hines* Court actually determined that greater control by the State existed at the Georgia Ports Authority; although still insufficient to outweigh the primary consideration of who was ultimately responsible for paying an adverse decision were the litigation to continue. Because Chatham County has less oversight and responsibility to the State of Georgia, Chatham County cannot and should not be found to be an "arm of the state." (*Hines v. Georgia Ports Authority, supra, at page 94)*

The Official Code of Georgia § 36-1-1 lists the names of the 156 counties in the State of Georgia; however, it does not provide a definition of the counties' powers or status. The general powers and duties of the counties are contained

in O.C.G.A. § 32-4-41. This grant of power includes authority for the planning, designating, improving, managing, controlling, and constructing an adequate county road system including the designation that the county shall have control of and responsibility for all construction, maintenance, or other work related to the county road system. Though O.C.G.A. § 32-4-41 does not specifically address bridges, O.C.G.A. § 48-5-220(4) specifically authorizes counties to collect taxes for the purposes of building and repairing public buildings and bridges. Thus, these three statutes read together, define Chatham County's responsibility for maintaining roads within its borders, and specifically authorizes Chatham County to collect taxes for the purpose of maintaining the Causton Bluff Bridge.

In conjunction with the duty to maintain bridges and the right to raise the necessary funds to maintain bridges, O.C.G.A. § 32-4-70(b) provides specific authorization for Chatham County, and other counties, to enter into contracts with third parties for the repair of bridges located within its borders. Furthermore, the language of O.C.G.A. § 32-4-70(b) does not require or even suggest that these contracts are subject to review by the state government. The United States Supreme Court has long held that an unrestricted and unsupervised right to contract, such as that granted to Chatham County by the State of Georgia, is sufficient to deny a county's entitlement to sovereign immunity under the Eleventh Amendment. *See Lincoln County v. Luning,* 133 U.S. 529, 33 L. Ed. 766, 10 S. Ct. 363 (1890). (Another decision of the U.S. Supreme Court in conflict with the rulings of the trial and appellate courts in the instant case).

Chatham County's right to enter into contracts is significant; however, it represents only half of the State of

Georgia's definition of a county's powers and liabilities relative to the bridges within its borders. The State of Georgia has statutorily recognized that if Chatham County has a duty to repair and maintain the roads and bridges within the county and the necessary authority to carry out that duty, then the county must also bear the liability for any injury which results from such repairs. The liability is clearly set forth in O.C.G.A. § 32-4-71(b):

> If the condition of bridge repair authorized by Code Section 32-4-70 to be added to the performance bond is not taken, the contracting county or counties shall be primarily liable for all injuries caused by reason of any defective bridge for damages occurring within seven years of the contractor's work on the bridge and its acceptance by the county or counties, provided that the county shall be discharged from all liability upon the inclusion in the performance bond of the aforesaid bridge repair condition.

The clear import of the statute is that if a county hires a third-party to satisfy its duties to maintain a bridge, the county may enter into an agreement with that party to provide indemnification of the county's liability. However, the foundation of this authorization to enter into an indemnification agreement is that the county initially bears the "primary liability for all injuries caused by reason of a defective bridge for damage occurring within seven years" of work on the bridge. The statute does not even require that the repairs be the reason for the injury, only that the injury is caused by a defective bridge.

Therefore, since the law of the State of Georgia provides Chatham County with the independent authority to build the bridge, the duty to maintain the bridge once built, autonomy from state supervision and financing in the performance of that duty, and establishes that Chatham County is primarily liable for any damages which result from its operation of a defective bridge the State has thereby given its consent to be sued and therefore it is not entitled to sovereign immunity. The contrary rulings in the instant case created a conflict with Georgia law and should be reversed.

Chatham County is not entitled to sovereign immunity because the damages inflicted on the Plaintiffs were caused by the negligence performance of ministerial acts and the creation of a continuing nuisance.

Chatham County is not protected by sovereign immunity because it created a continuing nuisance and the act of repairing and maintaining the bridge is a ministerial act. In the instant case the repair and maintenance of the draw bridge relates solely to the physical execution of the work.

> When (the county) engaging in the work of opening, closing . . . or repairing (a street, or building a sewer) and is thus engaged in the physical execution of the work, it is evidently in the discharge of duties purely of a ministerial nature. It follows that the actual progress of such work by a county is of a ministerial character, and that the duties of a (road) supervisor in carrying out the physical details of the work are likewise ministerial in nature.

Joyce v. Van Arsdale, 196 Ga. App. 95, 97, 395 S.E.2d 275. Further, the *Joyce* Court stated, the removal of the (tree across

the county road) was the performance of a ministerial duty, not a discretionary one, regardless of the elements of "discretion" that may be present during the execution of the mandatory job. "(T)he execution of a specific task is characterized as ministerial even though the manner in manner in which it is accomplished is left to the employee's discretion." *Joyce v. Van Arsdale,* 196 Ga. App. 95, 97, 395 S.E.2d 275 citing *Miree v. United States,* 490 F. Supp. 768, 773-4 (N.D. Ga. 1980). Similarly, no official immunity is provided for ministerial acts negligently performed or for discretionary acts performed with actual malice or an intent to injure. *Crisp County School Sys. v. Brown,* 226 Ga. App. 800, 802(2), 487 S.E.2d 512. The question of whether a duty is ministerial or discretionary turns on the character of the specific act, not the general nature of the official's position. *Vertner v. Gerber,* 198 Ga. App. 645, 646, 402 S.E.2d 315. A ministerial act is defined as being one that is "simple, absolute and definite arising under conditions admitted or proved to exist and requiring merely the execution of a specific duty." *Stone v. Taylor,* 233 Ga. App. 886, 888(2), 506 S.E.2d 161. Further, "while the act of establishing a policy in the first place is discretionary, the acts of following established policies of inspecting and monitoring are ministerial tasks. *Woodard v. Laurens Co.,* 265 Ga. 404, 407(2), 456 S.E.2d 58.

The Georgia Court of Appeals in *Brannan v. City of Brunswick,* 49 Ga. App. 62, 174 S.E. 186 in dicta stated, ". . . We are convinced that the operation of the bridge by the municipality was a ministerial function." Under this rule and the allegations of the petition we are convinced that the operation of the bridge by the municipality was a ministerial function. We at the same time bear in mind the decision of *Watson v. City of Atlanta,* (267 Ga. 185, 475 SE 2d 896)

. . . , where it was held that the operation of a hospital by a municipality having authority to so operate is a governmental function, and the mere fact that the petition alleged that "in the maintenance of said Grady Hospital the city of Atlanta charged fees for patients entering therein" would not change "its character as a public institution and one operated by the municipal corporation in the performance of its governmental duties"; also the decision in *Cornelisen v. Atlanta* (146 Ga. 416, 915 SE 415), . . ., in which it was held that "it would not affect the public character of the duties of the officers, agent, or servants of the city that a purely incidental profit might result to the city from its operation or management of the park." These decisions in no way conflict with what we have said with reference to the maintenance and operation of the toll bridge in this case; instead, they might be cited as authority for this proposition. *Brannen v. City of Brunswick,* 49 Ga. App. 62, 174 S.E. 186, 190. Therefore, based on the authority of the Georgia Constitution, Article 1, Section 2, Paragraph 9(d), the exemption from sovereign immunity set out in that paragraph precludes the defense of sovereign immunity for the County because the damage was caused by a county employee's negligent performance of ministerial acts. Thus, the ruling of the trial and appellate courts in the instant case conflict with the rulings of the Georgia Appellate Court.

Likewise the Courts in their decisions in this case ignored the evidence of the numerous times the bridge collapsed and damaged vessels traversing under it thus creating a continuing nuisance. In *City of Bowman v. Gunnells*, 243 Ga. 809, 256 S.E.2d 782 (1979), the Georgia Supreme Court set out three guidelines to define a nuisance for which a city may be held liable. First, the defect or degree of misfeasance must be to such a degree as would exceed the concept of mere

negligence, second, the act must be of some duration, and third, the city must have failed to act within a reasonable time after knowledge of the defect or dangerous condition. *Rainey v. City of East Point*, 173 Ga. App. 893, 894, 328 S.E.2d 567 (1985). (*Few v. City of Eatonton*, 189 Ga. App. 687, 377 S.E.2d 504 (1988)) Therefore, the ruling of this Court should be reversed because it refused to recognize Georgia law excluding the creation of continuing nuisances such as improper maintenance or repair to the bridge from sovereign immunity thereby creating another conflict between the rulings in the trial and appellate courts in the instant case and the rulings of the Georgia Appellate Court.

The District Court's reliance on *Gilbert v. Richardson* (264 Ga. 744, 452 S.E.2d 476) and *Federal Maritime Commission v. South Carolina State Port Authority* (535 U.S. 743, 753, 122 S. Ct. 1864, 152 L. Ed. 2(d) 962) *as affirmed by the Eleventh Circuit is misplaced as the bases of those rulings render them inapplicable to the constitutional provisions, both Federal and State applicable to the facts of this case*)

It is significant that in the District Court's ruling affirmed by the Eleventh Circuit, it held in favor of the Defendant who asserted its immunity was based on "residual sovereign immunity" that arises from common law. (Opinion p.10). That Court cited *Gilbert v. Richardson* 264 Ga. 744, 745-46 (1994) and *Federal Maritime Commission v. S. C. State Ports Authority*, 535 US 743, 753, 122 S. Ct. 1864, 152 L. Ed. 2d 962. (USDC Order, p. 6) In *Gilbert v. Richardson*, the Georgia Supreme Court, discussed why sovereign immunity applied to the County and referred to the 1991 Constitutional Amendment, Article 1, Section 2, Paragraph IX (e), which stated, ". . . The Sovereign Immunity of the State and its

Departments can only be waived by an act of the general assembly which specifically provides sovereign immunity is thereby waived and the extent of such waiver." Citing Georgia Constitution, Article 1, Section 2, Paragraph 9(e). The same Georgia Supreme Court which ruled against sovereign immunity for a state agency in favor of prevalence of maritime law in the *Gilbert* opinion ignored Article 1, Section 2, Paragraph 9(d), which states,

> . . . all officers and employees of the State or its departments and agencies may be subject to suit and may be liable for injuries and damages caused by the negligent performance of or negligent failure to perform, the **ministerial** (emphasis ours) functions and may be liable for injuries and damages if they act with actual malice, all with actual intent to cause injury in the performance of their official functions. . . .

The provisions of this subparagraph shall not be waived. Georgia Constitution, Article 1, Section 2, Par. 9(d).

The Petitioners in this case have argued in their Brief and submit that operating a bridge was a ministerial function and this presentation was ignored by the trial Court and the Appellant Court. This argument cries out to be heard at this time and it should be considered. This argument also applies to this Court's ruling that it should distinguish and not apply the Court's application of *Federal Maritime Commission v. S. C. State Ports Authority* (535 U.S. 743, 753, 122 S. Ct. 1864 152 L. Ed. 2d 962.) In the majority opinion in the *South Carolina State Ports Authority* case a statement of Alexander Hamilton was quoted,

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state of the union. Unless, therefore, there is a surrender of this immunity and the plan of the convention will remain with the states. . . .

Federal Maritime Commission, South Carolina State Ports Authority, (535 U.S. 743, 753, 122 S. Ct. 1864 152 L. Ed. 2d 962.). There was a surrender of sovereign immunity for acts of a ministerial nature negligently performed on the Georgia Constitution , Article 1, Section 2, Paragraph 9(d). Moreover and most important, the entire S. C. State Ports Authority opinion dealt with the Eleventh Amendment immunity and residual common-law sovereign immunity was not mentioned in the entire 21-page opinion.

The extraordinary reliance on the trial court's misstatements of law and fact as it ignored the numerous cases decided by the U.S. Supreme Court which held state and local governmental authorities responsible for creating hazards to navigation has been so flagrant that summary reversal by this Court is demanded.

In *Conklin v. Norwalk* (1920, CA2 Conn) 20 F. 68, in which a malfunction of gates intended to keep traffic off a bridge when the draw was open delayed raising the draw, and consequently the bridge operator was held liable for the resulting collision on the basis of the operator's failure to provide a warning signal to the approaching vessel.

A company that supplied power to a drawbridge was held to be properly impleaded in a claim for damages by a tugboat owner liable for a collision which resulted from failure of the bridge to open in *Eureka Towing Line, Inc. v. New York* (1922, DC NY) 283 F. 858, finding that a defect in the company's power transmission system fused the bridge's lift rails, preventing it from opening. The court cited *Clement v. Metropolitan West Side El. R. Co.* (1903, CA7 Ill) 123 F. 271, for the proposition that one maintaining a drawbridge over navigable waters is bound to use reasonable care not to impede vessels, and held the proposition applicable to a company. No ruling was made dismissing New York on the grounds of sovereign immunity.

Where a towed schooner was struck and damaged by the draw of a municipal swing bridge that went out of control and over-swung, and the court found that a locking mechanism that would have prevented the over-swing had been out of order for some time, it held the city liable for the damage in *Etheridge v. Philadelphia* (1885, DC Pa.) 26 F. 43. Noting that the defect should have been discovered in the exercise of proper vigilance, and that the city had in fact been notified of it long before the accident, the court held that it was the city's duty to keep the bridge in proper repair, and that the accident had resulted from its failure to discharge that duty.

In *The Majestic* (80 F.2d 879, 1936, CA4 VA), a mechanical problem prevented the opening of a bridge in response to a vessel's signal, and the bridge tender was held liable for failure of the bridge tender to give a prompt warning signal. The bridge was owned and opened by the United States. *The Majestic* (80 F.2d 879, 1936, CA4 VA)

In *Miami v. Western Shipping & Trading Co.* (1956, CA5 Fla.) 232 F.2d 847, the court held a city liable for damage incurred by a ship being towed through a municipal bascule bridge when a braking mechanism failed, permitting one leaf of the bridge to fall on the ship. In affirming the trial court's decision holding the city liable the court noted that testimony of the city's employees established that a similar failure had occurred 3 days previously, that the bridge tender on duty at the time of the accident had been told upon starting his shift that something was wrong with the braking mechanism, and that a repair crew working on the bridge at the time of the accident had observed the braking mechanism malfunction shortly before the accident. Given these facts, the court held the city was clearly negligent in lifting the bridge and signaling the ship to proceed under it.

A vessel, having given proper signal to open the bridge and prudently proceeding under slow speed, has, in the absence of proper warning, the right to assume that the bridge will be timely opened for passage. In this case the bridge tender was also held liable. (*City of Chicago v. Mullen*, 116 F. 292, 54 C.C.A. 94). Likewise, there was no exemption on the grounds of sovereign immunity.

CONCLUSION

Based upon the arguments asserted herein involving the mandate of the principles of uniformity in federal maritime law and that state legislated immunity has no application in federal maritime tort claims, the County employees were performing a ministerial function and the County created a continuing nuisance for which there is no sovereign immunity and the ruling of the Georgia Supreme Court in *Hines v. Georgia Ports Authority et al.* which held that "federal admiralty law governs claims sounding in admiralty, regardless of whether the claim is brought in state or federal court and that state-conferred immunity is preempted by admiralty law, we submit that for all of the foregoing reasons Certiorari should be granted and the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit should be subject for review by this Honorable Court.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JANUARY 28, 2005

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 04-13308
Non-Argument Calendar

D. C. Docket No. 03-00099-CV-4

ZURICH INSURANCE COMPANY, subrogated to the rights of James K. Ludwig, Jr. & Carol C. Ludwig,

Plaintiff-Appellant,

versus

CHATHAM COUNTY, GA,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Georgia

(JANUARY 28, 2005)

Before BLACK, PRYOR and FAY; Circuit Judges.

Appendix A

PER CURIAM:

This case presents the question of whether or not a Georgia county can be held liable in admiralty for a maritime tort. The district court granted summary judgment to Defendant Chatham County, Georgia, ruling that it was an arm of the State of Georgia, and entitled to sovereign immunity. Moreover, the district court found that Chatham County did not waive its sovereign immunity. Plaintiffs, Zurich Insurance Company, James K. Ludwig, Jr., and Carol Ludwig appealed. We agree that Chatham County is entitled to invoke sovereign immunity, and therefore affirm the district court's grant of summary judgment to the Defendant.

Chatham County owns, operates, and maintains the Causton Bluff Bridge, a drawbridge over the Wilmington River in Georgia, which is part of the Intercoastal Waterway. On October 6, 2002; James K. Ludwig sailed his vessel on the Intercoastal Waterway, approaching the Causton Bluff Bridge. Mr. Ludwig contacted the bridge operator and requested that the bridge be raised, to allow his vessel to pass underneath. The bridge tender then raised the spans, but the Northwest span of the bridge drifted down; striking Mr. Ludwig's vessel: The damage to the boat amounted to $137,987.67. Mr. Ludwig and his wife, Carol, and their insurer, Zurich Insurance Company, sued Chatham County to recover their expenses. Both Chatham County and the Plaintiffs moved for summary judgment. The district court granted summary judgment to Chatham County, holding that the County enjoyed sovereign immunity because by acquiring land, constructing, and operating the bridge, the County

Appendix A

exercised state powers. Additionally, because the County had no immunity-waiving insurance, the Plaintiffs could not demonstrate that the county waived that sovereign immunity.

We review a district court's grant of summary judgment *de novo*, applying the same legal standards used by the district court. *O'Ferrell v. United States*, 253 F.3d 1257, 1265 (11th Cir. .2001). Summary judgment is proper where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). We construe the evidence in the light most favorable to the non-moving party, and resolve all reasonable doubts about the facts in favor of the non-movant. *See Burton v. City of Belle Glade,* 178 F.3d 1175,1187 (11th Cir. 1999).

At issue in this case is the Plaintiffs' ability to sue Chatham County. It is clear that the State of Georgia itself cannot be sued under maritime law based on Eleventh Amendment sovereign immunity. *See Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 753 (2002). The same immunity, however, does not extend to counties.[1] Rather; common law has carved out a "residual immunity," which would protect a political subdivision such as Chatham County from suit. *See Gilbert v. Richardson*, 452 S.E.2d 476, 478

1. Chatham County is not asserting an Eleventh Amendment. immunity defense, which would be inapposite to our holding in *Vierling v. Celebrity Cruises, Inc.*, 339 F.3d 1309 (11th Cir. 2003). In *Vierling*, we explained that the Broward County Port Authority was not an arm of the state for Eleventh Amendment purposes because Florida law treated it solely as an entity of the county. Florida had no control over the operation of the port facilities, and Port Authority was an unfunded, independent, and self-sufficient enterprise.

(Ga.. 1994); *Fed. Maritime Comm'n*; 535 U.S. at 753 ("the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular, exemplification of that immunity").

In *Broward County, Fla. v. Wickman*, the former Fifth Circuit determined, in a substantially similar case where the plaintiff s yacht struck an underwater abutment attached to a county-owned bridge, that "a state and its political subdivisions are immune from process in actions of this character, even in admiralty." 195 F.2d 614, 615 (5th Cir. 1952).[2] *Wickman* explained that because the county owned the bridge and used power delegated by the state to operate the bridge, then the county enjoyed sovereign immunity from a suit in admiralty. *Id.*

The *Wickman* court took care to distinguish itself from *Workman v. City of New York*, 179 U.S. 552 (1900), a case primarily relied upon by the Plaintiffs here, where the Supreme Court addressed the substantive law of admiralty, and wrote that local law could not preempt federal admiralty law in order to exempt the City of New York from process. As substantive law was not the issue in *Wickman*, the Fifth Circuit drew a parallel to another Supreme Court decision, *Ex Parte State of New York*, 256 U.S. 490 (1921), which as part of procedural law, found that sovereign immunity principles prevented a court from exercising jurisdiction over the defendant. 256 U.S. at 500. Although our binding

2. In *Bonner v: City of Prichard* 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

precedent is far from recent, the same principle holds true today: "the immunity of a state from a suit in personam in the admiralty brought by a private person without its consent is clear." *J. Ray McDermott & Co., Inc. v. Dept. of High., State of La.*, 267 F.3d 317 (quoting *New York,* 256 U.S. at 500).

We note, however, that when a city, county, or other municipal entity is not exercising power delegated from the state, it cannot be sheltered by sovereign immunity. *Wickman*, 195 F.2d at 615. Therefore, we turn to a decision of this Court in a nearly identical case involving the same bridge, the same county and the same tort. We affirmed, without opinion, the case of *Continental Ins. Co. v. Chatham County. Ga.*, Case No. 04-106610F (11th Cir. 1/14/2004). In *Continental*, the district court granted summary judgment to Chatham County on grounds of sovereign immunity, and explained that the first line of inquiry should be whether the entity could be deemed a part of the State, because only then may it invoke residual sovereign immunity. In addressing that question, the trial court found Chatham County to be an arm of the State of Georgia because it exercised state power by "acquiring the land and constructing/operating the public highway and bridge in question." *See e.g.*, O.C.G.A. § 32-4-92 (enumerating state's delegation of its powers to county with respect to the operations of a county road system); O.C.G.A. § § 32-4-70, 32-4-71 (governing county authority to contract for the construction and maintenance of bridges). Moreover, this Court has held that "sovereign immunity extends to counties, as subdivisions of the state." *Kitchen v. CSX Transp., Inc.*, 6 F.3d 727, 731 (11th Cir. 1993).

Appendix A

The district court in the instant case adopted much of *Continental's* reasoning, and we agree, as we did in affirming *Continental.* This case is no different, and, despite Plaintiffs' insistence, the "mere act" of maintaining and operating bridges and roads does not waive a county's sovereign immunity. In *Continental*, the district court noted Chatham County's lack of immunity-waiving insurance as evidence of non-waiver. Chatham County's insurance policies have not changed since. Additionally, we previously have found that "the State of Georgia is immune to suit for any cause of action unless sovereign immunity is expressly waived by constitutional provision or statute." *Kitchen*, 6 F.3d at 731. Chatham County has not so expressly waived its sovereign immunity. Thus, because Chatham County is not attempting to exempt itself from a suit in admiralty via local law, *see Workman*, nor has it waived sovereign immunity, we AFFIRM the district court's grant of summary judgment for the Defendant Chatham County.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA FILED JUNE 23, 2004

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

Case No.: CV403-99

ZURICH INSURANCE COMPANY,

Plaintiff,

vs.

CHATHAM COUNTY, GEORGIA,

Defendant.

ORDER

Before the Court is Defendant's Motion for Summary Judgment (Doc. 10), Plaintiff's Motion for Summary Judgment (Doc. 16), and Plaintiff's Motion to Strike (Doc. 14). After careful consideration, the Court **GRANTS** Defendant's motion for summary judgment and **DENIES** Plaintiff's motion for summary judgment and motion to strike.

BACKGROUND

This case arises out of an accident that occurred on October 6, 2002, when James K. Ludwig attempted to transverse the Causton Bluff Bridge ("Bridge"). The Bridge

is a drawbridge that is owned, operated and maintained by Chatham County, Georgia. It is permanently connected to the Islands Expressway, a public road maintained by Chatham County, which connects the City of Savannah with Whitemarsh, Wilmington, and Tybee Islands.

The primary purpose of the Bridge is to allow passage of vehicles over the intercoastal waterway of the Wilmington River. The Bridge consists of an elevated approach on piles with a concrete abutment on each side of the intercoastal waterway which contains controls, a motor, gearing, counterweights, and pivot and braking mechanisms for each half of the span. The Bridge permits passage of light pleasure craft, tug and tow vessels, and commercial vessels over the water of the intercoastal waterway of the Wilmington River. The County employs bridge tenders to open the Bridge for that purpose.

On October 6, 2002, Ludwig was in his vessel, "the Love of My Life," ("the Vessel") which is insured by Plaintiff Zurich Insurance Company. As he approached the Bridge, Ludwig contacted the bridge tender and requested that the Bridge be raised to permit his transit. At that time, the bridge tender opened the Bridge, pursuant to Ludwig's request, but soon noticed that, the northwest span of the Bridge was drifting down. Immediately, the bridge tender attempted to make radio contact with Ludwig to warn him of the Bridge's disfunction, but Ludwig had turned off his radio before entering the Bridge operational area. The Bridge tender stopped the span of the Bridge that was drifting down and started to raise it back up. However, the Vessel hit that span, then deviated to the southwest, striking the Bridge. As a result

of the accident, $78,980.50 worth of damage was incurred on the Vessel. Plaintiff incurred additional expenses, all totaling $137,987.69.

On June 2, 2003, Plaintiff filed its Complaint in this Court asserting three counts: (1) negligence, (2) maintenance of a continuing nuisance, and (3) statutory and/or regulatory fault for violation of the navigable servitude encompassed by the U.S. Coast Guard and U.S. Corps of Engineers Permits. On November 24, 2003, Defendant filed the motion for summary judgment now before the Court, claiming that Plaintiff's claims are barred by the doctrine of sovereign immunity. On December 16, 2003, Plaintiff filed its response to Defendant's motion, as well as its own cross motion for summary judgment. Defendant filed a response to Plaintiff's motion on December 29, 2003.

Plaintiff filed its-motion to strike on December 16, 2003, seeking to strike the affidavit of Robert Drewry contained in Defendant's Motion for Summary Judgment. Defendant filed its response on December *29*, 2003.

ANALYSIS

I. Standard of Review

Summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Fed. R. Civ. P. 56 (c). The "purpose of summary, judgment

is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348,. 1356, 89 L. Ed. 2d 538 (1986) (quoting Fed. R. Civ. P. 56 advisory committee's note). Summary judgment is appropriate when the nonmovant "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986); *Tidmore Oil Co. v. BP Oil Co. /Gulf Prods. Div., a Div. of BP. Oil Co.*, 932 F.2d 1384, 1387-88 (11th Cir. 1991). The substantive law governing the action determines whether an element is essential. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986); *DeLong Equip. Co. v. Washington Mill Abrasive Co*, 887 F.2d 1499, 1505 (11th Cir. 1989).

"[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, if any, which it believes demonstratc the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2553. The burden then shifts to the nonmovant to establish, by going beyond the pleadings, that there is a genuine issue as to facts material to the nonmovant's case. *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1583 n.16 (11th Cir. 1991); *Chanel, Inc. v. Italian Activewear of Fla., Inc.*, 931 F.2d 1472, 1477 (11th Cir. 1991). A dispute of material fact "is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict

for the nonmoving party." *Liberty Lobby*, 477 U.S. at 248, 106 S. Ct. at 2510. However, if the nonmoving party's response to the, summary judgment motion consists of nothing more than mere conclusory allegations, then the court must enter summary judgment in the moving party's favor. *Pepper v. Coates*, 887 F.2d 1493, 1498 (11th Cir. 1989). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, [then] there is no genuine issue for trial." *Matsushita*, 475 U.S. at 587, 106 S. Ct. at 1356; *see also Liberty Lobby*, 477 U.S. at 252, 106 S. Ct. at 2512; *Johns v. Jarrard*, 927 F.2d 551, 556 (11th Cir. 1991).

In assessing whether the movant is entitled to summary judgment in its favor, the district court must review the evidence and all reasonable factual inferences arising from it in the light most favorable to the nonmoving party. *Welch v. Celotex Corp.*, 551 F.2d 1235, 1237 (11th Cir. 1992); *Ryder Int'l Corp. v. First Am. Nat'l Bank*, 943 F.2d 1521, 1523 (11th Cir. 1991). The Court must avoid weighing conflicting evidence. *Liberty Lobby*, 477 U.S. at 255, 106 S. Ct. at 2513; *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 934 (11th Cir. 1987). A mere "scintilla" of evidence supporting the opposing party's position, however, will not suffice. *See, e.g., Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990). Nevertheless, where a reasonable fact finder may "draw more than one inference from the facts, and that inference creates a genuine issue of material fact, then the court should refuse to grant summary judgment." *Barfield v. Brierton*, 883 F.2d 923, 933-34 (11th Cir. 1989) (citation omitted). In light of this standard, the Court will now address the parties' arguments for summary judgment.

Appendix B

II. *Defendant's Motion for Summary Judgment*

Defendant contends that summary judgment should be granted in its favor on Plaintiff's claims because it is entitled to sovereign immunity. The Eleventh Circuit Court of Appeals recently held in *Vierling v. Celebrity Cruises*, 339 F.3d 1309, 1313-15 (11th Cir. 2003), that a Florida county is not entitled to a defense of immunity based on Eleventh Amendment-Sovereign immunity.[1] However, Defendant asserts as the source of its immunity, not the Eleventh Amendment, but a "residual sovereign immunity" that arises from common law. *See Gilbert v. Richardson*, 264 Ga. 744, 745-46 (1994); *Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 753, 122 S. Ct. 1864, 152 L. Ed. 2d 962 (2002).

The Eleventh Amendment is a Congressional response to the Supreme Court's decision in *Chisolm v. Georgia*, 2 U.S. 419 (1793), which held that "Article III of the Constitution authorized citizens of one State to sue another State in federal court." *Fed. Maritime*, 535 U.S. at 752, 122

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1. The Eleventh Amendment provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI.

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S. Ct. at 1870. The adoption of the Eleventh Amendment effectively overturned *Chisolm*'s holding. However,

> [i]nstead of explicitly memorializing the full breadth of the sovereign immunity retained by the States when the Constitution was ratified, Congress chose in the text of the Eleventh Amendment only to 'address the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the Chisholm decision.' As a result, the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity.

Id. at 753, 122, S. Ct. at 1871 (quoting *Alden v. Maine*, 527 U.S. 706, 723, 119 S. Ct.. 2240, 144 L. Ed. 2d 636 (1999)) (citing *Blatchford v. Native. Village of Noatak*, 501 U.S. 775, 779, 111 S. Ct. 2578, 115 L. Ed. 2d 686 (1991)).

This case does not involve a state, but rather a county. If Plaintiff were attempting to sue the State of Georgia, the question of the state's sovereign immunity would be clear. *See Fed. Maritime*, 535 U.S. at 760, 122 S. Ct. at 1875 (holding that, a state cannot be subject to suit in the Federal Maritime Commission because of its substantial similarity to an Article III Court). The pertinent issue before the Court then is whether the County is entitled to the same immunity as the state.

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According to-Defendant, it is entitled to the protection of sovereign immunity because it is a political subdivision of the State of Georgia. In support of its argument, Defendant cites *Broward County, Fla. v. Wickman*, 195 F.2d 614 (5th Cir. 1952),[2] which, involved a suit, in admiralty for damages resulting from an accident in which a yacht struck an underwater projection that was part of the abutment of a county-owned drawbridge. In that case, the Fifth Circuit held that the county, as a political subdivision of the state, was immune from suit.

In support of its holding, the Fifth Circuit relied on two cases, *Ex Parte State of New York*, 256 U.S. 490, 500 (1921), and *Workman v. City of New York* 179 U.S. 552, 570 (1900), and concluded that a Florida county that owned and operated a public bridge using power delegated to it from the state enjoyed sovereign immunity from admiralty process, the functional equivalent of being immune from an admiralty suit altogether. *Wickman*, 195 F.2d at 615. In *Wickman*, the circuit court based its decision not on the immunity provided by the Eleventh Amendment, but on the state's residual sovereign immunity. *Cont'l Ins. Co. v. Chatham County*, No. CV403-38 (S.D. Ga. Jan. 14, 2004) (order granting summary judgment). When a city or other municipal entity is not exercising power delegated from the state, however, the *Wickman* court acknowledged that sovereign immunity would not be available. *Wickman*, 195 F.2d at 615.

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2. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

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The issue then becomes whether, in this case, the County may be deemed part of the state, either by having exercised power delegated from the state, or because it is a political subdivision of the state. If the County is deemed part of the state, then it may invoke residual sovereign immunity. *See Principe Compania Naviera, S.A. v. Bd. of Comm'rs of Port of New Orleans*, 333 F. Supp. 353, 354-56 (E.D. La. 1971) (recognizing residual sovereign immunity to protect a "sovereign or a party with sovereign attributes"); *J. Ray McDermott & Co. v. Dent of Highways, State of La.*, 267 F.2d 317 (5th. Cir. 1959) (affirming lower court's extension of sovereign immunity to a department of the state). However, if it is not deemed part of the state, then it is subject to this Court's jurisdiction and Plaintiff's claims may proceed.

To determine whether a governmental entity was acting as part of the State, courts typically examine whether it was exercising power delegated from the State or whether it was performing a proprietary function. *See, Michaeledes v. Golden Gate Bridge, Highway and Transp. Dist.*, 202 F. Supp. 2d 1109, 1111 (N.D. Cal. 2002) ("Lower courts are to determine a public entity's sovereignty 'not by the mere names of the titular parties but by the essential nature and effect of the proceeding, as it appears from the entire record.'") (citing *New York*, 256 U.S. at 500, 41 S. Ct. at 588; *Workman*, 179 U.S. at 570, 573-74, 21 S. Ct. at 212); *see also Gilbert v. Richardson*, 264 Ga. 744, 452 S.E.2d 476 (1994) (identifying counties as departments or agencies of the state for state law immunity purposes). Plaintiff does not dispute that counties exercise state power to acquire land and build and operate bridges. *See* O.C.G.A. § 32-4-92

(preamble) (enumerating state's delegation of its powers to a county with respect to county road systems); *id.* at (3) (A) (counties may exercise the state's power to condemn land for roads); *id.* at (8) & (11) (county can exercise the state's power to tax for road-building/maintenance purposes); O.C.G.A. §§ 32-4-70 - 32-4-71 (governing county authority to construct, reconstruct and repair bridges, payment bonds for same).

By acquiring the land, constructing, and operating the bridge in question, the County was exercising these state powers. Merely building and operating roads and bridges does not waive its sovereign immunity. *Kordares v. Gwinnett County*, 220 Ga. App. 848, 849-50, 470 S.E.2d 479 (1996); *see also Kitchen v. CSX Transp., Inc.*, 6 F.3d 727, 731 (11th Cir. 1993) (noting that in the absence of waiver, Georgia's sovereign immunity extends to counties as subdivisions of the state). In fact, it is Plaintiff's burden to show a waiver. *Smith v. Chatham County*, 264 Ga. App. 566, 567-68, 591 S.E.2d 388 (2003). In this case, the County has no immunity-waiving insurance, and Plaintiff has not otherwise shown that the County's sovereign immunity was waived. Accordingly, the Court finds that the County is protected by sovereign immunity. Defendant's motion for summary judgment is GRANTED.

CONCLUSION

Defendant's motion for summary judgment is **GRANTED** on sovereign immunity grounds. Plaintiff's claims are **DISMISSED WITH PREJUDICE**. The Clerk of Court is **DIRECTED** to **CLOSE** this case. Because summary judgment has been granted in Defendant's favor, Plaintiff's cross motion for summary judgment and motion to strike are **DENIED AS MOOT**.

SO ORDERED this 20th day of June, 2004.

s/ William T. Moore, Jr.
WILLIAM T. MOORE, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED MARCH 4, 2005

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 04-13308-DD

ZURICH INSURANCE COMPANY, subrogated to the rights of James K. Ludwig, Jr. & Carol C. Ludwig,

Plaintiff-Appellant,

versus

CHATHAM COUNTY, GA,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Georgia

BEFORE: BLACK, PRYOR and FAY, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant, Zurich Insurance is DENIED.

ENTERED FOR THE COURT:

s/ Peter Fay
UNITED STATES CIRCUIT JUDGE

FILED
JUN 28 2005
OFFICE OF THE CLERK

(2)

No. 04-1618

IN THE

Supreme Court of the United States

ZURICH INSURANCE CO. subrogated to the rights of JAMES K. LUDWIG, JR. and CAROL C. LUDWIG,
Petitioners,

v.

CHATHAM COUNTY, GEORGIA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Are there compelling reasons for granting a writ of certiorari when there is no conflicting decision on the issue of whether Chatham County as a political subdivision of the State of Georgia with power delegated by the State to operate, construct and maintain bridges, is entitled to "residual" sovereign immunity in this admiralty case?

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tenances incidental to the construction, maintenance, and enjoyment of such rights of way. . . :

(B) Bridges; . . ."

O.C.G.A. § 33-24-51 (b) states: "The sovereign immunity of local government entities for a loss arising out of claims for the negligent use of a covered motor vehicle is waived . . ."

O.C.G.A. § 36-85-1 (6) states: "'Group self-insurance fund' or "fund" means a pool of public moneys established by an interlocal risk management agency from contributions of its members in order to pool the risks of general liability, motor vehicle liability, property damage, or any combination of such risks."

O.C.G.A. § 32-4-71 (b) states:

"If the condition of bridge repair authorized by Code Section 32-4-70 to be added to the performance bond is not taken, the contracting county or counties shall be primarily liable for all injuries caused by reason of any defective bridge for damages occurring within seven years of the contractor's work on the bridge and its acceptance by the county or counties, provided that the county shall be discharged from all liability upon the inclusion in the performance bond of the aforesaid bridge repair condition."

O.C.G.A. § 32-4-70 (b) states:

"Where the contract relates to the construction or reconstruction of all or a part of a bridge, the county or counties affected may require the successful contractor to add to the conditions of the performance bond required under paragraph (1) of Code Section 32-4-69 the following condition: to keep the bridge in good condition for a period of not less than seven years."